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IN THE COURT OF APPEALS
STATE OF GEORGIA

FILED IN OFFICE

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CLERK COURT OF APPEALS OF GA

PAUL A. McCLESKY,
Appellant,
vs.

THE HOME DEPOT, INC., RICKY JORDAN, WILLIE GONZALES, CARLA BROWN, & VERICON RESOURCES, INC.,
Appellees.

CASE NO. A03A1066

BRIEF OF APPELLANT

COMES NOW Appellant, Paul A. McClesky, in the above captioned case, as amended, and files this his Brief on appeal, as follows:

NOTE: R = Record Volume; P = Page in Volume.
SR = Supplemental Record
Plaintiff McClesky will be referred to as Appellant. Co-defendant Home Depot, Inc., which by amendment was changed to Home Depot USA, Inc., will be referred to as Home Depot. Co-defendant Vericon Resources, Inc. will be referred to as Vericon.

1.

STATEMENT OF CASE

A. Basis for Appeal

On October 16, 2002, the State Court of DeKalb County, Georgia, granted Appellee Vericon Resources, Inc.'s Second Motion for Summary Judgment (R-1, P-603) The Court denied Vericon's

First Motion for Summary Judgment as well as denying Vericon's Motion for Reconsideration. (R-1, P– 166) (R-1, P-173-175)

The trial court granted Vericon's Second Motion for Summary Judgment on two grounds. (R-1, P-179)

(1) That the statute of limitations had run on the libel and slander claim. (R-1, P-201)

(2) Appellant McClesky amended his original Complaint to include a tort claim for gross and willful negligence, and punitive damages against Co-defendant Vericon Resources, Inc. (R-1, P-128)

The Court granted Vericon's Second Motion for Summary Judgment to this allegation on the ground that Appellant expressly released Vericon as Home Depot's agent "from any and all liabilities, claims or lawsuits in regard to the information obtained from any and all of the above referenced sources (i.e., those listed in the consent) used." (R-2, pg. 606)

B. Background Information

Appellant was born on December 22, 1966, in Atlanta, Fulton County, Georgia. (R-3, P-1068)

When Appellant was about 12 to 15 months old, he was abandoned by his mother. People heard him crying and broke into the apartment and rescued him. Appellant was turned over to the Department of Family and Children Services. Mrs. Barbara Carter was his case worker. (R-1, P-218) (R-1, P-273)

No one knew his name, so in 1970, the Department of Family and Children Services gave him the name of Tito Charles Brown. (R-1, P-281 & P-273)

Appellant went to high school and college using the name of Tito Charles Brown. (R-1, P-301 & P-273)

With the help of Mrs. Barbara Carter, his former case worker, Appellant succeeded in finding his mother. (R-1, P-281 & P-273)

When Appellant found his mother, she told him his real name, and he started calling himself by his real name, Paul Antonio McClesky. Some people kept calling him Tito, which was the name Family and Children Services gave him. A few people at Home Depot called him Tito. This was the name given to Appellant by Family and Children Services, not any kind of alias. (R-1, P-273 & P-274)

On or about September 6, 1989, Appellant, under his real name, Paul A. McClesky, was sentenced for a felony, served time, and probation. This is the only conviction Appellant has. (R-1, P-274)

On or about August 10, 1999, Appellant filled out an employment application with Home Depot U.S.A. Inc. (R-1, P-274)

One question on the application was as follows: Have you ever been convicted of a felony or a misdemeanor within the last 5 years, including guilty and nolo contendere pleas, (other than traffic violations]. Appellant's answer was "No" (R-3, P-889/Ex. 4) because he had not had a

conviction of any kind since on or about September 6, 1989. Appellant began work on August 28, 1999 at Home Depot. (R-1, P-24) (R-3, P-889/Ex. 3)

Vericon did background checks and reports on Appellant which were submitted to Home Depot on August 27, 1999, when he began work, and on February 16, 2000. Appellant never knew they were made, nor was he given a report on their findings. (R-1, P-274-5)

Appellant's employment performance was graded from time to time. These all are excellent reports. He also received some five merit badges for performance. It can be seen from these reports that Appellant was not fired for poor performance. (R-1, P-275, Para. 12)

On the morning of November 16, 2000, Appellant got word to come to the store manager's office at Home Depot where he was employed. When Appellant arrived, William Gonzales, Appellant's supervisor, was there with the Store Manager, Ricky Jordan.

Present in the office were five people: Ricky Jordan, Carla Brown, from the Gainesville, Georgia store, William Gonzales and Appellant. No one knew who the fifth person was in the room during the hearing. Neither Home Depot, nor the firing committee, Jordan, Brown and Gonzales, knew the name of the fifth person present.

Carla Brown was the human resources person for the Gainesville, Georgia store. Brown and Jordan, with Jordan in charge, asked the questions.

Appellant was asked if he had any aliases and about any crimes he had committed on December 14, 1998. Brown read from the Confidential Report, furnished by Vericon, and named the crimes set out in Exhibit 5 under the name of Edward James Sims, Jr. (R-2, P-588, Para. 8 & P-

591 [Plaintiff was in prison from 1995 to 1999 and could not commit a crime on December 14, 1998) (See Para. 24, P-591 – for crimes Appellant charged with committing on December 14, 1998)

Appellant denied the charges and denied that he ever had an alias. (R-1, P-275-279, McClesky Affidavit)

C. Facts

Vericon admits the following:

(1) That it did not have a license as required by O.C.G.A. § 43-38 et seq. to do background checks on prospective employees for businesses, Home Depot or anyone else. (SR-P-30, # 44)

(2) That it furnished the Confidential Report which resulted in Appellant being fired from Home Depot on November 16, 2000. (R-1-P, 185)

(3) That it was an agent for Home Depot in making the background checks filed with Home Depot. (R-2-P, 606, Judge's Order, 2nd para.)

(4) That it had checked Appellant on August 27, 1999 and February, 2000; and October, 2000; (SR-P-17, # 6; P-18, # 9)

(5) That Vericon was in the business of background checks; such as was done in this case; (SR-P-16, # 4)

(6) That it did background checks for Home Depot in four of Home Depot's five districts in the USA; (SR-P-18 & 19, # 10)

(7) That Vericon did not make the background checks itself as it contracted out all of its background investigative work to Androcloes, Inc., a Florida Corporation; (SR-P-18, # 9) (SR-P-20, # 13) (SR-P-30, # 44) (SR-P-26, # 33)

(8) That Home Depot did not know this; (SR-P-16, # 5) (SR-P-18, # 10)

(9) That Androcloes, Inc. made the background checks and reported the findings to Vericon; (SR-P-20, #13)

(10) That Vericon put them in their computer as received from Androcloes, Inc.; (SR-P- 20, # 13) (SR-P-17, # 33)

(11) That Vericon took these alleged reports on Appellant and sent them to Home Depot, in a confidential report, over the name of Vericon Resources, Inc. In this case, no name was signed to the report marked Confidential, but it was on Vericon Resources' paper. (SR-P-20, #15)

(12) That Home Depot paid for these background checks and investigations; (SR-P-25, #29)

(13) That Vericon no longer does background checks for Home Depot; (SR-P-18, #10)

(14) That the Confidential Report was done by Androcloes, Inc. and was done prior to November 13, 2000. Vericon received the report from Androcloes, and Vericon put it in their computers, then faxed the Confidential Report to Home Depot on November 13, 2000 as the product of Vericon on Vericon's letterhead; (SR-P-20, # 9) (SR-P-23, # 24) (SR-P-25, # 29)

(15) That on November 16, 2000, based upon Vericon's Confidential Report, Home

Depot fired Appellant. (R-1, P-116, Paras. 3 & 4) (R-1, P-184, Paras. 4, 5 & 6) (R-1, P-276, Para. 8) (Vericon's Response to Plaintiff's First Interrogatories, July 26, 2002)

When Jordan fired Appellant on November 16, 2000, Appellant denied any wrong doing and asked that he be given a leave of absence without pay, and that they check again as he was not guilty. Jordan's reply was, "Once fired, always fired," and ordered him out. A fifth person had been in the room the whole time of the termination hearing, and no one remembered his name. This fifth person took Appellant out of the office, led him to the door, and told Appellant to leave and not come back. This person stood in the door until Appellant was out of sight. Appellant does not know the name of the fifth person. Brown did not remember there being a fifth person in the room. At the time of Gonzalez' deposition, he did not know the name or anything about the fifth person in the room.

Home Depot does not know who the fifth person was who was present at the firing of Appellant on November 16, 2000.

After being fired, Appellant applied for unemployment insurance with the Georgia Department of Labor. Home Depot, along with Carla Brown, Ricky Jordan, and Ken Stein for Home Depot, testified opposing Appellant receiving unemployment insurance because of the "falsifying company records" charge, based upon Appellant stating that he had not been convicted of a felony within five years of August 10, 1998. This was all based upon Vericon's Confidential Report of November 13, 2000. (R-1, P-275-279, Paras. 13-28 of Appellant's Affidavit) (R-3, P-775-779 of Appellant's Depos.)

Vericon states that any claim for defamation against Vericon Resources, Inc by Appellant is absolutely barred by the statute of limitations. (R-1, P-201 B) Appellant denies this.

On October 28, 2000, Home Depot requested that Vericon perform a criminal history search on Paul A. McClesky. (R-1, P-184, Para. 5)

On November 13, 2000, Vericon sent the Confidential Criminal History Report to Home Depot. The cover sheet is attached to Thiel's Affidavit as Exhibit 3. (R-1, P-184, Paras. 5 & 6)

Vericon contends that under controlling Georgia law the statute of limitations commenced on November 13, 2000 regardless of whether Plaintiff had knowledge of the alleged defamation on November 13, 2000. (R-1, P-202)

Appellant states that the Confidential Report that Appellant bases his Complaint upon is set out in Exhibit 2 attached to Thiel's Affidavit which is attached to Vericon's Second Motion for Summary Judgment as Exhibit A. (R-1, P-188-189)

Home Depot received a copy of the Confidential Report on November 13, 2000 from Vericon. It was not signed. (R-1, P-184, Para. 5)

Vericon Resources did not publish the criminal history background search on Appellant to anyone. Vericon delivered the report to Home Depot only. (R-1, P-185, Para. 10) (SR-P-28, # 30)

There was a Certification By User of Information Agreement signed by Home Depot with Vericon. (R-1, P-195) (R-1, P-185)

Vericon claims it is covered under the release Home Depot got from Appellant. This release referred to agents of Home Depot. Vericon is in a position of confidentiality with Home Depot

inasmuch as Vericon was Home Depot's agent with reference to the confidential background criminal investigation of Appellant at Home Depot's request. (R-1, P-199)

Vericon sent the Confidential Report to Tami Patty (Paddy), the Human Resources person at the store where Appellant worked. Human Resources deals with personnel problems. (R-1, P-193)

Vericon stated that the contents of the criminal history report was not general knowledge. Vericon delivered the report to its principal, Home Depot. (R-1, P-185) (R-1, P-184)

Vericon is an agent for Home Depot dealing with sensitive and private matters specializing in pre-employment background investigations for employers. (O.C.G.A. § 43-38, et. seq.; O.C.G.A. § 10-6-60) (R-1, Ex. "A", P-182) (R-2, P-606, Judge's Order)

Home Depot requested that Vericon perform a criminal history search on Appellant. (R-1, P-184, Para. 5)

Vericon's insistence that when it delivered the Confidential Report to Home Depot on November 13, 2000, the statute of limitations began to run. (R-1, P-202)

STATEMENT OF JURISDICTION

Appellant shows that the jurisdiction is properly in this Honorable Court because it is one of those cases in which jurisdiction is not reserved to the Supreme Court or conferred on other courts by law, all as provided in Art. VI, Sec. V, Para. 3 of the 1983 Constitution of the State of Georgia, and involves the correction of errors of the trial court.

PRESERVATION OF ERRORS

Preservation of errors was accomplished by depositions, interrogatories, notice for the production of documents, affidavits and documentary evidence.

ENUMERATION OF ERRORS

The trial court erred in granting Co-defendant Vericon's Second Motion for Summary Judgment, dated October 16, 2002, on the following grounds:

(1) That Appellant expressly release Vericon as Home Depot's Agent " . . . from any and all liabilities, claims or lawsuits in regard to the information obtained from any and all of the above referenced sources listed in the Consent Agreement."

(2) That the statute of limitations as to the claim of libel had run on November 13, 2000, and the Appellant's claim was dismissed..

ARGUMENT AND CITATION OF AUTHORITY

1. The trial court erred in granting Vericon's Second Motion for Summary Judgment on the ground that as agent for Home Depot, Vericon is entitled to Summary Judgment as to all of Plaintiff's negligent claims because Plaintiff executed a covenant not to sue Home Depot or its agents. (R-1, Ex. 5, P-892, McClesky Depos.)

The Covenant not to sue is between Appellant and Home Depot, dated August 21, 1999; Background Investigation Consent. (R-1, Ex. 5, P-892) Neither Vericon, nor Home Depot have a claim for relief under this covenant not to sue between Appellant and Home Depot for the following reasons:

(a) Vericon specialized in providing, "pre-employment employee background investigations for employees. *(SR-P-16, # 4 and Thiel Affidavit, President of Vericon, Ex. A, para. 2 attached to Vericon's Second Motion for Summary Judgment.)* (R-1, P-183, Para.2)

(b) Marcia E. Thiel is, and was, President of Vericon Resources, Inc. at the time of this incident, and for five years prior to August 5, 2002. (R-1, P-183, Paras. 1 & 2) *(Thiel's Affidavit, Ex. A, para. 2, attached to Vericon's Second Motion for Summary Judgment.)*

(c) On October 28, 2000, Home Depot requested that Vericon perform a criminal history background search on Paul McClesky, Appellant. Allegedly, on November 13, 2000, Vericon delivered the results of the search. This criminal background search included Fulton, Cobb, DeKalb, and Gwinnett Counties, Georgia. *(Ex. 2 of Thiel's Affidavit, Ex. A, para. 2, attached to Vericon's Second Motion for Summary Judgment.)* (R-1, P-184, Para. 5)

(d) This criminal report attached as Ex 2 is the report Appellant complains about in his Complaint. *Thiel's Affidavit, Ex. A, para. 6, attached to Vericon's Second Motion for Summary Judgment.)* (R-1, P-184, Para. 6)

(e) Set out in this criminal report referred to in (d) above is the following criminal conviction that Appellant complained about and was charged with committing under the alias of "Sims:"

CASE No. V 10023 Filed November 3, 1998

Charge: Count 1 – False Imprisonment (Felony); Count 2 – Terroristic Threats (Felony)
Count 3 – Cruelty to Children (Felony) Reduced to Battery (Misdemeanor)
Count 4 - Simple Battery (Misdemeanor)

Disposition: December14, 1998 – Guilty All Counts

Sentence: Count 1 - Serve 1 year; 4 years probation with Count 2 revocation; May 16, 2000;
Count 3 – 12 years probation; Count 4 – 12 years probation

Memo Note: May or may not be subject, he has multiple alias names: Tito
Name on Index: Edward James Sims, Jr.
DOB: Not indexed
SSN: Not indexed
(R-1, P-190 of Ex. 2, pg. 188)

(See Appellee Home Depot's October 10, 2002 Statement of Material Fact To Which There Is No Dispute, pg. 2, para. 24.) **Appellant did not commit these crimes.**

(f) Appellant was in prison for parole violation from 1995 until April, 1999, and could not have committed the crimes he was charged with on December 14, 1998. (R-2, P-587, Para. 4)

NO LICENSE

(g) Vericon Resources, Inc. did not have a license to do criminal background investigative work. (SR-P-30, # 44)

O.C.G.A. § 43-38 et seq. requires that Vericon be licensed by the State Board of Private Detectives and Security Agencies to do background checks for businesses on prospective employees or their employees. (O.C.G.A. § 43-38-3(B)(E))

O.C.G.A. § 43-38-16 states that anyone doing business such as Vericon in criminal background investigative work and not legally licensed or registered under this Chapter, shall be guilty of a misdemeanor.

The Court said in Georgia Central Credit Union v. Weems, 157 Ga.App. 439 (1981):

> Where a statute enacts, for the purpose of securing a more effectual compliance with its requirements in respect to the licensing of certain occupations, that no one shall engage in or carry on any such occupation until he shall have obtained the license as provided by law, it is an express prohibition without more particular words.

Contracts made in violation of such a statute are void and unenforceable.

There is no argument but that this statutory regulation is to control and regulate a business that delves into one's private life and conduct, business wise and otherwise. The very fact that it is a misdemeanor for every day or portion thereof that one operates without a license is proof of the serious nature of the business. Vericon's business is regulated by a board that has licensing control over this kind of operation and one must show the type people involved because of the privacy of persons being invaded, and the public must have protection therefor. The State Legislature created a State Board of Private Detectives and Security Agencies to keep a check on these businesses and the type of people employed.

Vericon Resources was violating the law at the rate of a misdemeanor for each day or portion thereof. By having no license, any contracts made by Vericon in violation of this statute are void and unenforceable. The Court held that no one shall engage in or carry on any such occupation until he shall have obtained the license as provided by law. O.C.G.A. § 43-38 et. seq. sets out the requirements for a person or business to qualify to do what Vericon was doing. It violated them all. Vericon could not legally operate a background checking service. By investigating and going into Appellant's private life illegally, it had no defense against the tort claims filed by Appellant.

Therefore, any alleged contract that Vericon was operating under was void and unenforceable, which the court said is an "express probation without more particular words" (Georgia Central Credit Union, supra). Vericon is prohibited from enforcing any claim under the

background investigation consent signed by Appellant on August 21, 1999, with Home Depot because Vericon was violating the law as it is statutorily forbidden to operate a business.

What is true of its agent is also true of Home Depot. Home Depot employed Vericon as its agent and is bound by its agent's illegal acts, which the courts have held are void. Vericon cannot legally sign contracts to, nor carry on, this type of business or occupation it is engaged in without a license. Any contract signed, or work done, is void and unenforceable. Home Depot is ". . . bound for neglect and fraud of agent." O.C.G.A. § 10-6-60. The principal is responsible for the torts of the agent when the agent is acting on behalf of the principal. DeDauiess v. U-Haul Co., 154 Ga. App. 124 (267 SE2nd 633 (1980). What an agent does in the line of duty devolved upon him by the superior will make the latter responsible under this section and O.C.G.A. § 10-6-51. Maddox & Rucker v. Cunningham, 68 Ga. 431 (19). O.C.G.A. § 10-6-56, principal shall be bound by all representations and willful concealment made by agent. *(See Court Order of October 16, 2002, pg. 4, finding that Vericon was an agent of Home Depot)* (R-2, P-606, Court Order, 2nd paragraph)

Obviously Vericon concealed the fact from Home Depot that it was not licensed to do criminal background investigations. This is proven by the fact that Home Depot terminated its contract, or agreement, with Vericon shortly after it was revealed that Vericon had no license to do background checks. Home Depot cannot claim immunity from suit by Appellant because Home Depot is responsible for the acts of its agents. Home Depot used the illegally obtained information it received from Vericon to fire Appellant. Not only was it illegally obtained, but it was the wrong information on Appellant. Home Depot had charged Appellant with a crime he did not commit.

Despite Appellant's informing them that they had the wrong person, Home Depot fired Appellant and charged him with falsifying company records. Home Depot did this even though they admit Appellant did not commit the crime they charged him with.

Vericon is not authorized by law to engage in criminal background investigative work such as it was when it filed the confidential background report on Appellant with Home Depot on November 13, 2000. *(See Court Order of October 16, 2002, pg. 4, finding that Vericon was an agent of Home Depot)* (R-2, P-606, Court Order, 2nd paragraph)

Appellant has an interest in the acts of both Home Depot and Vericon in this case. Each is trying to keep Appellant from successfully suing either of them for libel/slander and negligence, gross and willful negligence, and punitive damages for an illegal act charging Appellant with committing felonies when he had not done so, thus a libel per se. (R-1, P-188, Ex. 2, page 190, Edward James Sims, Jr.; also, R-2, P-591, Para. 24, Home Depot Ex.)

Not having a license to be in the business of criminal background investigations did not deter Vericon from illegally contracting with Home Depot to do criminal investigative background checks. Vericon, formerly, provided this service for four out of five regions for Home Depot across the United States. Vericon no longer represents Home Depot in such cases; they were fired for illegally operating its business, no doubt.

For the last five years, Marcia E. Thiel has been the President of Vericon Resources, Inc. All this time Vericon has been in the pre-employment background investigation business. (R-1, P-

183, Paras. 1 & 2) *(SR-P-16, # 3 and Ex. A, Thiel's Affidavit attached to Vericon's Second Motion for Summary Judgment.)*

Vericon did not do background investigative searches as it contracted with a third party to do the actual searches, and then filed the reports as if it had done the work. (SR-P-17, #6)

When Appellant asked which employee of Vericon performed Home Depot's employee's background check, the reply was: "As phrased, Defendant Vericon cannot accurately respond." (SR-P-18, # 9) (SR-P-20, # 13) (SR-P-20, # 15) (SR-P-26, # 32) The reason being that no one at Vericon did background work because they were not licensed to do this type of work and everyone, including President Thiel, knew they were violating the law. It was intentional. It was planned. It was illegal to contract with a third party to furnish the background searches for Vericon to file with Home Depot as if they had done the work..

Vericon's answer to Plaintiff's Interrogatory No. 10 was that Vericon Resources provides reports to Home Depot based upon a user agreement which requires Home Depot to use the information provided by Vericon in accordance with the Fair Credit Reporting Act. (SR-P-8, # 10) Vericon could not and did not have a legal user agreement with Home Depot and could not perform background investigative work legally because it had no license. Home Depot could not, by the use of the illegally obtained illegal evidence, ratify it because the contract was void and unenforceable. *(See Ex. 4 attached to Vericon's Second Motion for Summary Judgment)* (R-1, P-185, Para. 9, and R-1, P-194-195, Ex. 4)

Appellant's Interrogatory No. 12, dated July 26, 2002: "Did Vericon furnish the report that on December 14, 1998, Mr. McClesky, under the alias of "Edward James Sims, Jr." or "Tito" was found guilty of false imprisonment (felony); terroristic threats (felony); cruelty to children (felony), which was reduced to battery (misdemeanor); and simple battery (misdemeanor) to serve one year in prison with four years probation on the first two Counts and twelve years on the latter counts."

Answer: Defendant Vericon objected to Appellant's Interrogatory No. 12 on the grounds " . . . that it is overly broad, unduly burdensome, vague, and not limited in its scope and direction." *(Note: The reason this jargon and double talk was used is because of the rest of the answer.)* (SR-P-19, # 20)

"Subject to this objection, without waiving same, Vericon Resources denied the predicate of this interrogatory but acknowledges it provided the report marked Ex. C in the Affidavit of Marcia E. Thiel, which is *Ex. A attached to Vericon's Second Motion for Summary Judgment.* This document speaks for itself." This is the same person, Edward James Sims, Jr., and the same crime enumerated as set out in Defendant Home Depot's Statement of Material Facts To Which There Is No Dispute in which it is stated that Appellant was in jail from 1995 to 1998. *(Pg. 6, Para. 24 & pg. 2, para. 4)* Sims committed the crimes on Dec. 14, 1998.

In Appellant's Interrogatory No. 13, dated July 26, 2002, Vericon stated that a third party, Androcloes, Inc., conducted the actual data base search and provided the information to Vericon. (SR-P-20, # 13)

In answering Interrogatory No. 15, dated July 26, 2002, Vericon stated: Vericon submits no one at Vericon 'made this background check,' and it was not signed. (SR-P-20, # 15) This is the document identified in Thiel's Affidavit and in Home Depot's Statement of Material Facts that got Appellant fired. Appellant was in jail when it happened..

In answering Interrogatory No. 21, Vericon states that it normally relies on an individual's name, social security number, and date of birth. Because Appellant did not contact Vericon to dispute his report, there was no subsequent search based on fingerprints. (SR-P-21, # 21)

When Appellant was called before Jordan and the other "persons in authority", Appellant did not know about the search, who made, or why. Also Carla Brown read all of Appellant's criminal background in the confidential report. When finished reading, she refused to tell Appellant that Vericon made the investigation and refused to give Appellant a copy of the charges. It was not until the Department of Labor Unemployment Hearing some four months later that Appellant knew Vericon had made the report. (R-1, P-275, Para. 13 to P-278, Para. 22) (R-2, P-592-593, Paras. 28-30)

In answering Interrogatory Nos. 25 and 33, Vericon stated its employees did not make background checks and that Vericon received the report from Androcloes, Inc., entered it in the computer system and, in turn, the appropriate investigative specialist assigned to this client (Home Depot) forwarded this information to Home Depot on November 13, 2000. (SR-P-23, # 25) (SR-P-26,27, # 33)

It is unbelievable that Vericon, knowing that they were operating illegally and with a void contract which was unenforceable, would claim that Appellant does not have the right to expect, and get, background investigative work done on him, and his past, by one authorized by the laws of Georgia to do so. When Appellant signed the release, dated 8/21/99, to Home Depot and its agents, it was releasing Home Depot and its agents from suit for legal investigative background searches authorized and permitted by law. In this case, due to Vericon having no license ,Vericon was not authorized to engage in or carry on any such occupation as investigating personal criminal backgrounds. Therefore, Vericon forfeits any right to claim any rights by virtue of the release.

Vericon is accusing Appellant of committing a crime he did not commit and which Vericon obtained the information and furnished it to Home Depot in violation of the law. This action was libelous per se in that Appellees falsely charged Appellant with child abuse, among other things. Vericon and its principal, Home Depot, are equally liable. "Libel per se consists of a charge that one is guilty of a crime, dishonesty or immorality." Eidson v. Berry, 202 Ga.App. 587 (1992). Home Depot is also guilty of libel per se for using its agent's illegally obtained and wrong information, thereby ratifying the illegal act. Would one believe that anyone as guilty as Vericon of violating the law claim that Interrogatory No. 33 was " . . . overbroad, unduly burdensome, vague and seeks to embarrass and harass this Defendant (Vericon) and seeks confidential personal information from this Defendant" (Vericon)? (SR-P-26, 27, # 33)

Appellant finds it hard to believe that an outfit that contracted with Home Depot to do background criminal investigative work would knowingly operate without a Georgia license from the State Board of Private Detectives. (SR-P-30, # 44)

It is also hard to believe you could embarrass them by asking a simple question about their relationship to Appellant whereby Vericon delivered a report to Home Depot and represented it as Vericon's work that they had not obtained legally or by their efforts.

Further, Vericon had not, as Home Depot's agent, told Home Depot about this, nor had Home Depot agreed for Vericon to farm this out. Vericon could not do this without written authority from Home Depot. Vericon was a sham background investigative researcher, fronting for Androcloes, Inc. to do the work, and illegally delivering confidential reports to Home Depot which included Appellant, on their letterheads as if Vericon had done the work. This confidential report was illegal, void and of no force and effect and totally unenforceable. Neither Vericon nor Home Depot have any legal standing because of Vericon's illegal acts and they know it. The report filed on Appellant was an outright fraud upon everyone because Home Depot admits that Appellant was in prison when the crime Appellant was charged with was committed as set out in Paragraphs 4 and 24 of Home Depot's statement of Material Facts. (R-2, P-587, Para. 4 and P-591, Para. 24)

There was nothing in the background investigative consent signed by Appellant on August 21, 1999, that released Vericon as agent for Home Depot or otherwise, or Home Depot from liability to blatantly violate the law and file an illegally obtained report, which was a totally false report, against Appellant in violation of the law and statutes of this State.

From the President on down, Vericon knew that they were violating the law, and doing so with impunity. Neither Vericon nor Home Depot can defend and dismiss a claim against them by Appellant when the defenses Vericon and Home Depot are using are based upon a knowing, intentional, and flagrant violation of the law of this State. Home Depot is bound by the acts of its agent. (See statutes and cases, supra. p.17)

Under Ga. Central Credit Union, supra, Vericon could not, as the case says: "Shall not engage in or carry on any such occupation until he (it) shall have obtained the license as provided by law, it is an express prohibition without more particular words".

Simply put, Home Depot and Vericon do not have a defense against Appellant's claims in this case of libel or the tort claims enumerated by Appellant against Vericon as their defense is based upon totally illegal grounds.

In Vericon's Brief in support of his Second Motion for Summary Judgment, pg. 4, it stated: " . . . Appellant cannot articulate any act or omission on behalf of Vericon Resources that supports his allegation for gross negligence." Appellant contends that allegations as stated on pgs. 12 – 21 of this Brief, certainly present a question of facts as to whether or not Vericon's illegal and negligent actions were gross negligence and done knowingly and willfully. This same portion of Appellant's Brief answers Div. D, pg. 9 of Appellee's Brief. Anyone can foresee proximate causes of negligence and when one knowingly and willfully violates the laws of Georgia which are directly applicable to Vericon and harms Appellant.

2. The Court erred in holding that Appellant's claim for libel and slander was barred by the statute of limitations.

Publication is an indispensable element of libel. Vericon misses the point as to when publication took place in this case. Publication is when someone other than the person libeled sees it unless that person is one in authority who needs to see it or is authorized as one in authority who has a right and need to see it. The people at Home Depot who received the report were people in authority and had a right to see the confidential report filed November 13, 2000 by Vericon, unless the fifth unknown person present at the meeting on November 16, 2000 had no right to be there.

Vericon was an agent for Home Depot performing confidential background investigations and thus was a part of the authority. (R-2, P- 4 of Judge's Order, 2nd para.)

Kramer vs. Kroger, 243 Ga. 883 (2000), puts it as plainly as the English language can when it states: " . . . however, the publication of allegedly defamatory information in the course of an employer's investigation of an employee's job performance, when made to persons in authority, is not 'publication' within the meaning of O.C.G.A. § 51-5-1(b)."

The findings were delivered by Vericon, agent of Home Depot, at the request of Home Depot, to Ms. Paddy, the Human Resources person. *(Gonzales July 12, 2002 Deposition, pg. 21)* She was a person in authority and one who needed to know. (R-1, P-184, Paras. 5, 6 & 7; see Ex. 3, P-193) The Confidential Report was then delivered to "persons in authority" – Rick Jordan, Manager of the store where Appellant worked and the one who hired and fired people, together with Carla Brown and William Gonzales, whom he had asked to sit in with him for the hearing on November 16, 2000.

Before the hearing on November 16, 2000, Vericon has not produced any evidence that there was a revelation of this Confidential Report. In fact, President Thiel stated in her Affidavit that Vericon delivered the report to Home Depot and no unauthorized person saw it. (*Ex.. A attached to Vericon's Second Motion for Summary Judgment)* Appellant has alleged, and made his case, that no one saw or heard this report submitted by Vericon, before November 16, 2000. In order to rebut Appellant's contentions, the burden is upon Vericon to show that until read to Appellant on November 16, 2000, there was no publication. This contention by Appellant stands unrefuted. Therefore, the statute began to run November 16, 2000, if anyone not authorized to see the report was present in the room. There was one unidentified person in the room.

There is no publication until someone with no right or authorization sees the libelous material. "A communication made by one corporate agent to another is not publication in the legal sense." Ekokotu vs. Pizza Hut, Inc., et al, 205 Ga. App. 534 (422 SE2nd 903) (1992).

Therefore, unless Kramer v. Kroger Co., supra, is overruled, no publication of these documents was made before November 16, 2000. It is well put in Kramer, supra, as follows:

Therefore, the issue is whether the personnel report was communicated to persons other than those 'in authority' at Kroger. Here, the record is devoid of any evidence that the [report] was shown to anyone who did not, by virtue of his job, need to be informed of all the factors involved in the decision to [suspend Kramer.]' These are absolutely the facts in this case. No one saw the report not authorized to see it before it was revealed to Appellant on November 16, 2000. Kurtz vs.

Williams, 188 Ga. App. 14 (37 SE2nd 878) (1988). Ekokotu, supra.. Based upon Kramer, supra, the libel was not published at least until November 16, 2000.

As agent for Home Depot, Vericon cannot relieve itself of negligence in that it operated, and obtained background information, illegally and was a party to publishing it. Appellant was fired as a result thereof.

On page 5 of Vericon's Brief in support of its Second Motion for Summary Judgment, next to last paragraph, Vericon made this erroneous and misleading statement. "The definitions of 'publication' of libel and slander both focus on the date in which a party other than Plaintiff is made aware of the allegedly defamatory statements." This is the position Vericon takes throughout its Brief. Vericon is dead wrong. None of the cases cited by Vericon deal with a background check by the business of an employer. Also, all of these cases pre-date the opinion set out in Kramer v. Kroger Co., supra. Kramer, supra, is the latest, last, and final word on libel where a company with persons in authority handled an investigative background check such as herein set out. However, regardless of whether a background check has been made, as long as only those who are supposed to or have to see the alleged libel are the ones who see it, there is no publication. (See Kurtz and Ekokotu)

Prins v. Holland North American Mortgage Co, 107 Wash. 206 @ pgs. 208, 209 (181 P680) (1919), holds that an agent of a corporation sending a libelous communication to another of its representatives cannot be a publication. The agent, Vericon, is a part and parcel of the authority at Defendant Home Depot by virtue of this special background check on Appellant, illegal though it

be. If Vericon did not publish the background check information then it was not published at least before November 16, 2000. Vericon states that no one saw the report until Home Depot did. *(Ex. A, Affidavit of Thiel, attached to Vericon's Second Motion for Summary Judgment)* (R-1, P-185, Para. 10)

Appellant does not have to prove what date Home Depot received the report from Vericon because the delivery date is immaterial. It is when the libel is published.

Vericon made the statement, on page 5 of its Second Motion For Summary Judgment, that in order to have filed a timely Complaint against Vericon, Appellant should have filed the Complaint within one year of the date of "publication." By placing quotation marks around "publication," it is obvious that Vericon does not understand what publication, in the context of libel, is. "A libel is published as soon as it is communicated to any person other than the party libeled." O.C.G.A. § 51-5-3. Still quoting Vericon, it says: "Along the same lines, publication is accomplished by communication of the slander to anyone other than person slandered. The definitions of "publications" of libel and slander both focus on the date in which a party, other than Appellant, is made aware of the allegedly defamatory statement." This is incorrect. (See: Kramer vs. Kroger, 243 Ga., supra, for an exception to O.C.G.A. 51-5-3.) (Kurtz, 188 Ga. App., supra, and Ekokotu, 205 Ga. App., supra.

Then Vericon states that on November 13, 2000, when Vericon delivered the Confidential Criminal History Report on Appellant to the Home Depot, the statute of limitations, as per

controlling Georgia law, commenced running on November 13, 2000. This is wrong. See the three cases cited in the above paragraph.

Vericon also states that by filing the libelous action on November 14, 2000, the statute of limitations had run and this was true whether Appellant had knowledge of the alleged defamation on November 13, 2000. This is also wrong.

Then Vericon proceeds to cite Smith v. Adamson, 226 Ga.App. 698 (1997) as authority for its proposition.

In Adamson, supra, on August 4, 1992, a letter was delivered to a newspaper, and was printed in the newspaper on August 5, 1992. A suit for defamation was filed on August 5, 1993, and defendant's Motion for Summary Judgment was granted based on the statute of limitations. Vericon contends that Adamson, supra, supports their position that the "delivery date" is the only material date for purpose of commencing the statute of limitations. Vericon then sates: "Here the Affidavit of Marcia E. Thief establishes the 'delivery date' as November 13, 2000, and the statute of limitations ran as of November 13, 2000."

The Court and Vericon continue to miss the point.

In Adamson, supra, the letter was delivered to a newspaper, a third party who was neither the party libeled nor "a person or persons in authority," or one who had a right or needed to see the libel.

As agent for Home Depot, Vericon made the investigation of Appellant and made this report to Home Depot because they employed Vericon to do the background check. Delivering the report

to Home Depot did not release Vericon of its agent responsibilities. Vericon still tried to gain a benefit from Appellant's alleged release of Home Depot and its agents. (R-1, P-187) (R-1, P-184, Para. 5 of Ex. "A", P-182)

Vericon completely overlooks Kramer, supra, which plainly says that: "The publication of allegedly defamation information in the course of an employer's investigation of an employee's job performance, when made to 'persons in authority,' is not 'publication' within the meaning of O.C.G.A. § 51-5-1(b)." (See Kurtz, supra and Ekokotu, supra.)

O.C.G.A. § 51-5-1(b). "Publication is an indispensable element of libel." This statute states that a libelous writing is published " . . . as soon as it is communicated to any person other than the party libeled." There has been a slight exception to that all inclusive statement, " . . . any person other than the party libeled." (Emphasis supplied.) Kramer, super, makes an exception wherein the investigation by an employer of an employee's job performance, if the allegedly defamatory information is made to "persons in authority' there is no publication within the meaning of O.C.G.A. § 51-5-1(b). There is no publication by Vericon, Home Depot's agent, upon its delivery to Home Depot of the confidential information found in its investigation, nor does Vericon's responsibilities for the report and how it was obtained and its content, end at delivery.

Kramer, supra, is also the last word in Georgia on the subject.

In Division C, pg. 7 of its Brief, Vericon attempts to explain away its dilemma but fails miserably. (R-1, P-203)

Vericon's explanation is that in Kramer, the Court of Appeals determined there had been no "publication" of the alleged defamed material because the only recipients of the alleged defamed material were individuals "in authority" at Kroger. In this case, Vericon never disseminated or published the criminal history background report to anyone other than individuals "in authority" at Home Depot. This has been Appellant's contentions all along. Vericon overlooks the fact that it was Home Depot's agent that illegally furnished, at Home Depot's request, illegally obtained information, totally void and it was derogatory and untrue libelous material. Vericon furnished the weapon to its principal that damaged Appellant. The Principal-Agent relationship did not end when Vericon delivered this illegal, libelous material to Home Depot. Vericon was a part of the entire transaction from beginning to end. It was Home Depot's agent, (R-2, P-606, 2nd para.)

As an agent, Vericon is responsible for all its acts in the single transaction for all purposes. As Home Depot's agent, it gave to Home Depot the weapon to damage Appellant, which Home Depot used to do so. (R-2, P-606, 2nd para.)This makes Vericon equally guilty of libel with Home Depot. See O.C.G.A. § 10-6-60, § 10-6-51, as to agency, § 10-6-56 and cases; also: O.C.G.A. § 10-6-52 – Ratification may be accomplished by failure to repudiate acts of one's agent. Klingheil v. Renbaum, 146 Ga. App. 591 (24 S.E. 2d 698 (1978). Home Depot used the illegally obtained and false and untrue information to fire Appellant and accuse him of falsifying company records. Also, Home Depot appeared at the Labor Department hearing, approximately 4 months later, knowing that Appellant had not committed the crimes he was charged with, and still contended that Appellant had committed the crimes reported by Vericon.

STANDARD OF REVIEW

Clear and convincing evidence.

CONCLUSION

Vericon was forbidden by law to do the act that it did and its principal, Home Depot, is bound by the acts of its agent. Therefore, Appellant respectfully requests this Court to adjudge Appellee Vericon guilty of a libel and adjudge Vericon subject to suit in tort for willful and wonton negligence and punitive damages, and thereby reverse the trial court's granting of Vericon's Second Motion for Summary Judgment.

Respectfully submitted, this the 27th day of February, 2003.

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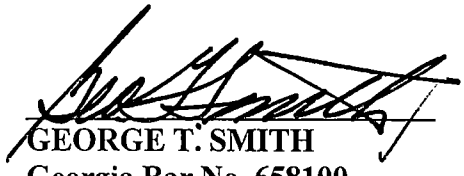

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CERTIFICATE OF SERVICE

This is to certify that I have this day served opposing counsel with a copy of the within and foregoing. by depositing a copy of said pleading in the United States Mail with sufficient postage affixed thereto to insure proper delivery and addressed as follows:

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This the 27th day of February, 2003.

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IN THE COURT OF APPEALS

STATE OF GEORGIA

PAUL A. McCLESKY,	)	
	)	
Appellant,	)	CASE NO. A03A1066
	)	
v.	)	
	)	
VERICON RESOURCES, INC.,	)	
	)	
Appellee.	)	

BRIEF OF APPELLEE VERICON RESOURCES, INC.

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BRIEF OF APPELLEE

The Trial Court correctly found that Appellee Vericon Resources, Inc. ("Vericon") was entitled to summary judgment as to all claims asserted against it by Appellant. There is no genuine dispute of any material fact, and Vericon is entitled to judgment as a matter of law. *Lau's Corp. v. Haskins*, 261 Ga. 491, 405 S.E.2d 474 (1991).

PART I: STATEMENT OF FACT

Appellant seeks recovery from Vericon for its alleged negligence and defamation of Appellant. Vericon delivered a criminal background check to Appellant's former employer, The Home Depot.

Vericon Resources provides pre-employment employee background investigation to employers. (R. 183). During the time relevant to this lawsuit, Vericon Resources provided its services to The Home Depot, and the two business acted under a User Agreement that required The Home Depot to comply with the Fair Credit Reporting Act with respect to all information it received from Vericon. (R. 185; 195).

Appellant Paul McClesky applied for employment with The Home Depot in August, 1999. As part of the application process, Appellant completed a Background Investigation Consent Form, in which he expressly authorized The Home Depot and/or its agents to conduct a criminal background investigation on him. (R. 892). In completing this form, he indicated his birth date was December 22, 1996, and his social security number was 260-25-9808. (R. 892). Finally, in this Background Investigation Consent Form, Appellant expressly agreed to "release Home Depot **and/or its agents and any person or entity, which provides information pursuant to this authorization,** from any and all liabilities, claims or lawsuits in regard to the information obtained from any and all of the above referenced sources used." (emphasis added) (R. 892).

On October 28, 2000, Home Depot requested that Vericon perform a criminal history search on Appellant. On November 13, 2000, Vericon delivered the results of a criminal history search to The Home Depot via facsimile transmission. (R. 184). As noted by the trial court in its Order, the report itself clearly demonstrates on its face that it was faxed to, and received by, The Home Depot on November 13,

2000. (R. 189-191, 606-07). The Home Depot then terminated Appellant three days later, in a meeting held on November 16, 2000. (R. 9).

Appellant did not file the instant action in the State Court of DeKalb County until November 14, 2001, or one year and one day after delivery of the report to The Home Depot. Appellant's original complaint alleged defamation against Vericon. (R. 4-15). Appellant later amended his suit to add counts for negligence, "gross negligence" and punitive damages against Vericon. (R. 128-34).

PART II: ARGUMENT AND CITATION OF AUTHORITY

A. The trial court correctly held that Vericon was entitled to Summary Judgment as to Appellant's negligence claims because Appellant executed a release and covenant not to sue.

As held by the trial court, the release and/or covenant not to sue signed by Appellant Paul A. McClesky serves as a bar against the institution of a civil action against Vericon. The trial court did not find it necessary to

determine whether the language in the agreement was a release or a covenant not to sue, and the distinction is irrelevant in light of the language itself. Whether it is deemed a release of any potential claims he may have, or a promise not to pursue those claims in the future, the language is clear and unambiguous as to the intent and effect of the provision.

Appellant executed this document voluntarily, and is therefore bound by its terms and restrictions.

O.C.G.A.§ 13-4-81 provides:

> A covenant never to sue is equivalent to a release as is a bond to indemnify a debtor against his own debt.

Unlike a release, a covenant not to sue does not extinguish a cause of action; instead it serves to bar the holder of the cause of action from asserting it against a party or parties with whom he has covenanted. Brantley Co. v. Briscoe, 271 S.E.2d 356, 246 Ga. 310 (1980). A covenant not to sue creates a personal right in the form of protection against suit and it serves as a valid defense against suit. Id. Where there is a covenant not to sue, it is important that the party to the covenant should not be sued in fact or

in fiction after the agreement has been executed. Weems v. Freeman, 216 S.E.2d 774, 234 Ga. 575 (1975).

Not only is the language of the Consent Form clear on its face, it unquestionably covers Vericon in its blanket of protection. The agreement covers not only The Home Depot, but also **any person or entity which provides information pursuant to this authorization**, from any and all liabilities, claims or lawsuits in regard to the information obtained from any and all of the above referenced sources used. (Emphasis added). (R. 892). Even if Appellant were to argue that Vericon is not Home Depot's agent (although he alleges the agency relationship throughout his brief), he cannot reasonably contend that Vericon does not qualify as a "entity which provides information pursuant to this authorization." The fact that "Vericon Resources" is not specifically mentioned in this covenant not to sue is of absolutely no consequence given the unambiguous language agreed to by the parties.

Appellant's covenant not to sue, or release, protects Vericon from liability as to any and all claims for negligence. *See* Wade v. Watson, 527 F.Supp. 1049 (N.D. Ga. 1981) (The Court concludes the authority in Georgia and

other jurisdiction is in agreement that one may exculpate himself from liability for his own simple negligence....). Appellant "freely and willingly" signed the Background Investigation Consent Form which waives the very remedy upon which he now relies. (R. 856). Summary judgement is appropriate, if not mandatory, in cases such as this because "exculpatory clauses in Georgia are valid and binding, and are not void as against public policy when a business relieves itself from its own negligence." Hall v. Gardens Svcs., 332 S.E.2d 3, 174 Ga. App. 856 (1985); Carrion v. Smokey, Inc., 298 S.E.2d 584, 164 Ga. App. 790 (1983). Appellant simply has no defense to his waiver of liability against Vericon Resources.

Admittedly, under certain circumstances, an injured party *may* recover for acts of "gross" negligence despite a valid release for negligence. *See* Turner v. Walker County, 408 S.E.2d 818, 200 Ga. App. 565 (1991). However, for purposes of the present motion, Appellant must point to evidence of gross negligence on the part of Vericon in order for his thinly veiled claims to survive. Barbazza v. Inter. Motor Sports Ass., Inc., 538 S.E.2d 859, 245 Ga. App. 790 (2000). Here, the record is completely devoid of any

evidence of gross negligence. All of the personal identification and background information utilized to conduct the records search came from Appellant's employment application. (R. 892). Appellant never spoke to anyone at Vericon. (R. 854). Appellant never made the effort to contact anyone at Vericon. (R. 853). Appellant does not know whether Vericon disseminated this report to anyone other than The Home Depot. (R. 854). Appellant does not know whether Vericon participated in his employment hearing. (R. 854). Finally, Appellant does not know whether Vericon instructed anyone at The Home Depot to fire him. (R. 859). Simply stated, Appellant cannot articulate any act or omission on behalf of Vericon that even remotely supports his allegation for gross negligence.

Rather than point to any evidence of negligence or "gross" negligence by Vericon, or otherwise factually support his allegations here, Appellant instead spends pages upon pages arguing that Vericon was somehow breaking the law by providing the subject report to The Home Depot. Throughout his brief, Appellant argues that Vericon does not hold proper licensing credentials to perform these activities, and it cannot avoid liability here because it is

"guilty" of breaking the law. All of this is done without ANY citation to case law or other authority holding that such a violation, *if it occurred*, would somehow overcome the release language signed by Appellant, or the problem he has with the statute of limitations.

Moreover, as Appellant himself acknowledges, Vericon did not do the actual criminal search, which was performed by a third-party independent contractor. (SR. 18, 20, 30; Appellant's Brief, p. 6). Nowhere has Appellant cited any authority characterizing Vericon's conduct in simply packaging and transmitting that information to Home Depot as illegal. Even if it was in violation of the law, however, that fact in no way changes the result here. From a civil liability standpoint, Appellant's claims against Vericon are still barred both by his voluntary release of all claims, and by the one year statute of limitations.

Because Appellant cannot point to any specific fact supporting his claim for gross negligence, and because the language in the agreement signed by Appellant wholly bars any claims for negligence or defamation, Appellee Vericon Resources requests this Court uphold and affirm the trial court's grant of summary judgment.

B. Appellant's claim for defamation against Vericon Resources is absolutely barred by the statute of limitations.

1. Appellant did not file his complaint within one year of the date of the alleged defamation by Vericon.

Appellant did not file a timely claim for defamation against Vericon Resources. In Appellant's original Complaint, he alleges a count of libel *per se* and a count of slander against Defendant Vericon. (R. 5-15). Libel *per se* and slander are both injuries to reputation according to O.C.G.A. § 9-3-33. As a result, claims for libel *per se* and slander are subject to a one year statute of limitation. *See* O.C.G.A. § 9-3-33.

In order to have filed a timely Complaint against Vericon, Appellant must have filed the Complaint within one year of the date of "publication." "A libel is published as soon as it is communicated to any person other than the party libeled." O.C.G.A.§ 51-5-3. *See also* Kramer v. Kroger Co., 243 Ga. App. 883, 886 (2000) ("[A] libelous writing is published 'as soon as it is communicated to any

person other than the party libeled.'"). Along the same lines, publication is accomplished by communication of the slander to anyone other than person slandered. *See* Kurtz v. Williams, 188 Ga. App. 14, 371 S.E.2d 878, *cert denied*, 188 Ga. App. 912, 371 S.E.2d 878 (1988). The definitions of "publication" of libel and slander both focus on the date in which a party other than Appellant is made aware of the allegedly defamatory statements.

On November 13, 2000, Vericon Resources delivered via facsimile the criminal history report on Appellant to The Home Depot. (R. 184). The report itself shows on its face the date and time of its transmission to Home Depot. (R. 189-91). Thus, under controlling Georgia law, the statute of limitations commenced on November 13, 2000, regardless of whether Appellant had knowledge of the alleged defamation on that date. Davis v. Hosp. Auth. of Fulton County, 269 S.E.2d 867 (1980); *citing* Irvin v. Bentley, 90 S.E.2d 359, 18 Ga. App. 662 (1916). Appellant does not dispute November 13, 2000 as the date Vericon communicated or delivered the report via facsimile to The Home Depot. (R. 851). In deposition, Appellant testified:

Q. Do you have any idea as to the date in which the background check was actually run on you the second time?

A. No, sir, I don't.

Q. And do you have any idea when that background check was actually provided from the company that I represent, Vericon Resources, to The Home Depot?

A. No. No.

(R. 851). Here, there is no genuine issue as to the material fact that Vericon delivered the report to The Home Depot on November 13, 2000. The trial court recognized this fact in its findings of fact. (R. 606-07).

Smith v. Adamson, 226 Ga. App. 698 (1997), involves a scenario factually analogous to the case at bar. In Adamson, a letter was delivered by defendant to a newspaper on August 4, 1992, and this letter was printed in the newspaper on August 5, 1992. A suit for defamation was filed on August 5, 1993, and this Court held that Defendant's Motion for Summary Judgment was properly granted based on the failure to meet the statute of limitation. Adamson, 226 at 701-02. Thus, Adamson supports Vericon's position, and the trial court's ruling, that the "delivery

date" is the material date for purposes of commencing the statute of limitations.

Here, the Affidavit of Marcia E. Thiel and the document itself establish the "delivery date" (i.e. the publication date) as November 13, 2000, and the lawsuit for defamation was filed November 14, 2001. Hence, the statute of limitations expired prior to the initiation of this lawsuit. Missing the statute of limitations by one day is no different than missing it by four months or one year. *See generally* O.C.G.A.§ 9-3-33. Appellant did not file a timely defamation action against Vericon Resources and, therefore, summary judgment was appropriate.

2. Kramer v. Kroger offers Appellant no relief in this case.

In his Brief, Appellant contends that the statute has not expired on his defamation claims, because there was not a "publication" on November 13, 2000. In support of this position, he relies extensively upon this Court's opinion in Kramer v. Kroger Company, 243 Ga. App. 883 (2000). In Kramer, the Plaintiff sued her employer for, among other things, defamation for placing a report in her personnel file accusing her of theft. The Court of Appeals determined

there had been no "publication" of the alleged defamed material because the only recipients of the alleged defamatory material were individuals "in authority" at Kroger. Kramer, 243 Ga. App. at 887. Because there was no publication, the claim for defamation was appropriately dismissed by the trial court. Id.

In the case *sub judice*, it does not matter whether the holding Kramer is applied or not - the outcome is the same. On the one hand, Kramer may not even be applicable to the instant set of facts, as all of the communications in Kramer occurred within the context of the employer's business, and did not involve an outside third party such as Vericon. Therefore, the holding that no publication occurred is logical, as the entire episode involved the employer/employee relationship.

It can therefore be reasonably argued that the ruling in Kramer is limited to those instances when the communication is an internal one within an organization, and involves a communication regarding an employee's job performance. It serves a recognized societal goal to allow employees to report alleged transgressions of co-workers to "persons in authority" without fear of litigation for

defamation. If that interpretation is adopted, then Kramer would have no application to the case at bar. Vericon did not occupy the role of an employee of Home Depot, and it cannot be seriously argued that it was Home Depot's agent to the extent its position would be analogous to that of Plaintiff's co-worker. Such an interpretation of Kramer would also be entirely consistent with the Adamson decision, and the more analogous facts upon which it is based.

If, however, the holding in Kramer is extended to cover all instances where a communication regarding an employee is made, regardless of the source, then there clearly has been no publication by Vericon here. If there has been no publication, then there can be no action against Vericon. It is undisputed that Vericon never disseminated or "published" the criminal history background report to anyone other than The Home Depot, who requested the information. (R. 185). Appellant admits in his brief that no individual who was "not authorized" saw the report before it was discussed with Appellant on November 16. (Appellant's Brief, pg. 23). Instead, he argues that an unknown and unidentified individual was present in the room on November 16 when the report was revealed to him, and he was

terminated. It is Appellant's apparent contention that the presence of this "unknown person" may be sufficient to create a fact question as to whether there was a publication.

There are two fatal problems with Appellant's position. First, if there was in fact disclosure to someone not "in authority," that was done by The Home Depot, and not by Vericon. Appellant admits in his brief that Vericon sent the report to Ms. Paddy, in the Human Resources department of The Home Depot, who he acknowledges to be a person in authority. (Appellant's Brief, pg. 22). (See also R. 185).

The second problem with Appellant's argument is that he utterly fails to provide the Court with any evidence that someone not "in authority" heard this information at that meeting on November 16. Simply alleging the presence of an "unknown person" in the room is clearly insufficient to meet his burden of coming forward with facts to create a material issue for the jury. Without additional information to indicate this mysterious person was not someone "in authority," there is no fact question presented for resolution. In fact, given that the other employees present at the meeting were all people "in authority," there is no

reason to believe that this alleged mystery attendee was not similarly anointed with this distinction. Appellant simply can point to no evidence that Vericon provided this information to anyone other than The Home Depot, the very entity he expressly authorized to obtain and review the information.

Therefore, it does not matter whether there is a finding that Vericon published the report when it faxed it to Home Depot on November 13, 2000, or a finding that there was never a publication pursuant to Kramer, because the report went to persons "in authority." Either way, the Appellant's claims against Vericon Resources fail as a matter of law, and were properly dismissed by the trial court.

C. The complete lack of foreseeability, and hence the absence of proximate cause, prevents Appellant from maintaining a negligence action against Vericon Resources.

Finally, the dismissal of Appellant's claims was appropriate because Vericon cannot be responsible for Appellant's termination from The Home Depot. Vericon did

not hire, nor could it fire, Appellant. To the contrary, Vericon was in the business of providing background reports to employers, such as The Home Depot, who in turn, promised to use the information in compliance with the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et. seq.* (R. 195).

Negligence is not actionable unless it is the proximate cause of the injury. Morris v. Baxter, 225 Ga. App. 186 (1997) *citing* Strickland v. DeKalb Hosp. Auth. 197 Ga. App. 63 (1990). A wrongdoer is not responsible for a consequence which is merely possible, according to occasional experience, but only for a consequence which is probable, according to ordinary and unusual experience. Id. The natural and probable consequences are those which human foresight can foresee, because they happen so frequently that they may be expected to happen again. Id. The possible consequences are those which happen so infrequently that they are not expected to happen again. Id. Thus, negligence is predicated on what should have been anticipated rather than on what happened. Id. Although the question of proximate cause is usually submitted to the jury for resolution, it may be decided as a matter of law on summary judgment where the evidence shows clearly and

palpably that the jury could reasonably draw but one conclusion, that the defendant's acts were not the proximate cause of the injury. Atlanta Gas Light Co. v. Gresham, 260 Ga. 391 (1990).

On or before October 28, 2000, a representative of Home Depot called Vericon and requested a background criminal history search on Appellant. (R. 184). As a matter of practice, Vericon does not ask the employer why it wants a search, and in fact, it considers this to be none of its business. (R. 184). Instead, it is the practice of Vericon to obtain the employee's relevant information from the employer, verify it has an executed Background Investigation Consent Form signed by the employee, gather information responsive to the search, and deliver the information to the employer. (R. 184-85). How the employer decides to use this information is left up to the employer. Vericon only requires the employer comply with the Fair Credit Reporting Act, 15 U.S.C. § 1581, *et. seq.* (R. 185 and 195).

On November 16, 2000, The Home Depot fired Appellant for falsifying company records. (R. 796). Obviously, Vericon did not participate in the termination meeting that occurred on November 16, 2000. Furthermore, Vericon did not

make any determination as to whether Appellant falsified any Home Depot company records, as they were not privy to them. Clearly, Vericon could not have foreseen, as a matter of law, that when it delivered the criminal background report to The Home Depot, this act would cause Appellant to be fired for falsifying company records. With all due respect to The Home Depot, the decision to terminate Appellant rested squarely on the shoulders of that entity, not Vericon Resources. Under any reasonable interpretation of proximate clause law, Vericon cannot be liable for employment decisions made by one of its clients.

CONCLUSION

Appellee respectfully requests this Court uphold and affirm the trial court's grant of summary judgment in favor of Vericon Resources, Inc.

Respectfully submitted,

SWIFT, CURRIE, McGHEE & HIERS, LLP

By: _____

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Attorneys for Appellee

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing APPELLEE VERICON RESOURCES, INC.'S BRIEF upon all parties to this matter by mail to counsel of record as follows:

George T. Smith, Esq.
BROWNING & TANKSLEY, LLP
166 Anderson Street, Suite 225
Marietta, GA 30060

This 19 day of March, 2003.

SWIFT, CURRIE, McGHEE & HIERS, LLP

By: _____
John W. Campbell
Georgia State Bar No. 002820

Attorneys for Appellee
Vericon Resources, Inc.

SWIFT, CURRIE, McGHEE & HIERS, LLP
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97-048
90
71

ORIGINAL

IN THE COURT OF APPEALS
STATE OF GEORGIA

PAUL A. McCLESKY,	*	
Appellant,	*	
	*	
vs.	*	**CASE NO. A03A1066**
	*	FILED IN OFFICE
THE HOME DEPOT, INC.,	*	
RICKY JORDAN, WILLIE	*	APR 0 7 2003
GONZALES, CARLA BROWN,	*	
& VERICON RESOURCES, INC.,	*	CLERK COURT OF APPEALS OF GA
Appellees.	*	
	*	

APPELLANT'S REPLY BRIEF

COMES NOW Appellant, Paul A. McClesky, in the above captioned case, and files this his Reply Brief as follows:

NOTE: R = Record Volume; P = Page in Volume.
SR = Supplemental Record
Plaintiff McClesky will be referred to as Appellant. Co-defendant Home Depot, Inc., which by amendment was changed to Home Depot USA, Inc., will be referred to as Home Depot. Co-defendant Vericon Resources, Inc. will be referred to as Vericon.

There are only two questions in this appeal to the Court of Appeals. They are:

That Paragraph 3 in Appellant's "Background Investigation Consent" authorized the trial court to grant Appellee a "Summary Judgment as to

Appellant's negligence claims," because Appellant executed a release and covenant not to sue. (R – 1, Ex. 5, P – 892)

-2-

Appellant's claim for defamation against Vericon Resources is absolutely barred by the statute of limitations. (Pg.10, Appellee's Brief, 3/19/02)

1. The "Background Investigation Consent." Release and Covenant not to sue.

Vericon Resources provides pre-employment employee background investigation to employers. (R – 183) Vericon Resources provided its services to the Home Depot, U.S.A., Inc., during the time relevant to this case. (R – 185: [95])

(a) Vericon Resources, Inc., did not have a license to do criminal background investigative work. (SR – P – 30, #44)

(b) O.C.G.A. Para. 43-38 et seq. requires that Vericon be licensed by the State Board of Private Detectives and Security Agencies to do background checks for businesses on prospective employees or their employees. O.C.G.A. Para. 43-38-3(B)(E).

(c) O.C.G.A. Para. 43-38-16 states that anyone doing business such as Vericon without a legal license or registered under this chapter shall be guilty of a misdemeanor.

(d) The Court of Appeals of Georgia in Georgia Central Credit Union v. Williams, 157 Ga. App. 439 (1981) said: "Where a statute enacts for the purpose of securing a more effectual compliance with its requirements in respect to the licensing of certain occupations, that no one shall engage in or carry on any such occupation until he shall have obtained the license as provided by law, it is an express prohibition without more particular words."

"Contracts made in violation of such a statute are void and unenforceable."

Appellees' words in its Brief on pages 8 and 9 are brilliant for their audacity. It says:

"Appellant instead spends pages upon pages arguing that Vericon was somehow breaking the law by providing the subject report to The Home Depot."

O.C.G.A. Para. 43-38-16, supra, states that it is a misdemeanor to do criminal background investigative work when not legally licensed to do so and is guilty of a misdemeanor for each day it operates without a license. Vericon

Resources, Inc., admitted it did not have a license to do criminal background investigative work, (SR – P –30, #44) thus confirming Appellee's "defense" of no license.

Throughout this Brief, Appellant argues that Vericon does not hold proper licensing credentials to perform these activities, and it cannot avoid liability here because it is "guilty of breaking the law." (From Pages 8 and 9 of Appellees' brief of March 19, 2002)

O.C.G.A. Para. 43-38-16 is where it says that if Vericon does not hold proper licensing credentials to perform these activities it commits a crime. Appellant only quoted the law.

Quoting from page 9 of Appellee's Brief of 2002: "All of this is done without any citation to case law or other authority holding that such a violation, if it occurred, would somehow overcome the release language signed by Appellant, or the problem he has with the statute of limitations."

"If it occurred"? On page 2 of Appellees' Brief, dated March 19, 2002, Vericon admitted that during the time relevant to this lawsuit, Vericon provided its services – pre-employment employee background investigation to employers. Also, it admitted that it had no license to do this work.

At the tope of page 9 , Appellee says "all of this is done without any citation to case law of other authority holding such a violation, if it occurred, would somehow overcome the release language."

Well, Vericon admits no license, therefore, a violation of the law occurred.

In the case of Georgia Central Credit Union v. Weems, 157 Ga. App., supra, (1981) that: ". . . no one shall engage in or carry on any such occupation until he shall have obtained the license as provided by . . ."; then the court says: "Contracts made in violation of such a statute are void and unenforceable." This case did not say "voidable," it said "void". That means no good, worthless, totally without value or enforceability. It means if you pursue the activity covered by this statute, you are trespassing, violating the privacy of the individual, and, as such, are guilty of gross and willful negligence. At the least it raises the question of a material fact as to which there is a dispute. It is axiomatic that negligence of any kind is for the jury and this certainly is a jury question in this case.

In this case, Vericon, by its own admission, filed with Home Depot a confidential report in which Appellant was charged with violating the law in four counts on December 14, 1998. (See R-1, P. –190 of Ex. 2, pg. 188)

The report filed with Home Depot by Vericon, by Marcia E. Thiel, marked Ex. C in Thiel's Affidavit which is Ex. "A" attached to Vericon's Second Motion for a Summary Judgment. This document speaks for itself.

Appellant was accused of committing:

Count 1 – False Imprisonment

Count 2 – Terroristic Threats

Count 3 – Cruelty to Children

Count 4 – Simple Battery

These crimes were really committed by one Edward James Sims, Jr.. Home Depot admitted Appellant was in jail for parole violation when the crimes were committed by Sims. Vericon also admitted that Vericon was not doing any background checking, that they contracted it out without Home Depot's knowledge or consent. (SR – P – 20, #13) The actual background investigative work was done by a third party, independent contractor. The name of the contractor who Vericon contracted with to do this work, which they were not licensed to do, was Androcloes, Inc., a Florida Corporation. (Sr-P-18, #9i) (SR-P-20, #13i) (SR-P-30, #44) (SR-P-26, #33)

What Vericon overlooks is it has no legal contract with Home Depot because O.C.G.A. § 43-38-3(B)(E) requires Vericon to be licensed. They were not.

Vericon HH

Georgia Central Credit Union v. Weems, supra, says ~~Weems~~ cannot do background investigative work without a license. Also, the case says contracts made in violation of such a statute are void and unenforceable. Vericon could not contract with Androcloes to do the work because Vericon could not contract with anyone. Its contracts were void.

The law will not enforce a contract, the performance of which is made penal. The crime is punished and the criminal must likewise lose the fruits of the illegal act. Jones v. Belle Isle, 13 Ga.App. 437 (1913)

Vericon's violation of the law in this case, by operating without a license as required by law, causes Vericon to lose the fruits of the illegal act. One of the fruits that Vericon claims it had coming to it was Appellant's release and covenant not to sue. By the commission of a crime of operating a business without a license, being a misdemeanor, Vericon cannot exercise its claim of a release and the use of the covenant not to sue signed by Appellant to Home Depot. O.C.G.A. § 13-8-1 – Contracts to do illegal things.

To accuse one of a felony he did not commit is libel per se and to file it in writing as an agent for another that you know is to be used as to hiring and firing is certainly negligence per se and punitive damages are due.

Certainly, Appellant did not execute a release and covenant not to sue Home Depot to employ someone that was not licensed to check into his private

life and background. Vericon had no contract that allowed it to check on or file a report as if it had checked on Appellant. The contract was void. What Vericon was doing was without contract or a legal right to do so. Therefore, it had no release from negligence or suit because of the fact any contract entered into was void and of no effect. That afforded Vericon no coverage because they were not legally employed by Home Depot, thus no rights to even check into Appellant's background.

Vericon could not claim a release from suit or protection from suit under Home Depot's release because Vericon was not a legal employee of Home Depot, thus a trespasser and they had no rights to sub-contract out Home Depot's work to a third party because Vericon could not legally contract with anyone as its contract with Home Depot was void as a matter of law, O.C.G.A. § 43-38-16 and Georgia Central Credit Union v. Weems, supra.

Answering Paragraph B of Vericon's brief in which Appellee contends that the statute of limitations had run on the defamation claim; To file an answer to the contentions of Appellee in his Brief would be to rehash everything already used on this question. Appellant confirms his original Brief.

Answering Paragraph C of Vericon's brief: Lack of forseeability by Vericon; absence of proximate cause.

Vericon furnished to Home Depot a report that was a total and complete wrong report on the wrong man. Vericon had Appellant's birthday, name and Social Security Number (R-892). Vericon also had Sims' birthday and name, but no Social Security Number. If they had compared the information in hand as to the two men they could have seen that the men were two different people. Different names, different birthdays and Appellant had a Social Security Number but Sims did not. Now how could they come up with the idea that Sims was an alias.

Vericon knew that it was not licensed to do background investigations and it is charged with knowing what the law is. Therefore, Vericon knew it was digging into the background and private life of Appellant when it had no legal right to do so and it knew that the contract that it had with Home Depot to do background checks was void and unenforceable. But with all of this knowledge they certainly cannot say that they could not foresee the outcome of their acts on Appellant. Also, under the facts in this case, foreseeability is for the jury to determine and this is another reason why summary judgment should be denied.

Appellant respectfully requests this Honorable Court to reverse the trial court and deny Appellee's Motion for Summary Judgment on all grounds.

Respectfully submitted, this the 7th day of April, 2003.

Of Counsel:
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GEORGE T. SMITH
Georgia Bar No. 658100
Counsel for Appellant

CERTIFICATE OF SERVICE

This is to certify that I have this day served opposing counsel with a copy of the within and foregoing. by depositing a copy of said pleading in the United States Mail with sufficient postage affixed thereto to insure proper delivery and addressed as follows:

John F. Wymer, III, Esq. King & Spalding 191 Peachtree Street Atlanta, Georgia 30303	Counsel for Home Depot USA, Inc., Ricky Jordon, Willie Gonzales, and Carla Brown, Defendants.
John W. Campbell, Esq. Swift, Currie, McGhee & Hiers 1355 Peachtree St., N.E., Suite 300 Atlanta, Georgia 30309	Counsel for Vericon Resources Inc. Defendant

This the 7th day of April, 2003.

GEORGE T. SMITH
Counsel for Appellant

FOURTH DIVISION
SMITH, C. J.,
RUFFIN, P. J., MILLER, J.

November 7, 2003

In the Court of Appeals of Georgia

A03A1066. McCLESKEY v. VERICON RESOURCES, INC. Ru-048

RUFFIN, Presiding Judge.

After Paul McCleskey was fired from his employment with The Home Depot, Inc., he sued both Home Depot and Vericon Resources, Inc., the company that provided a report to Home Depot that purportedly showed McCleskey had falsified his employment application. The trial court granted Vericon's motion for summary judgment. In two enumerations of error, McCleskey challenges the trial court's ruling. Finding no error, we affirm.

A trial court properly grants summary judgment when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[1] In

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[1] See *Rodriguez v. Vision Correction Group*, 260 Ga. App. 478 (580 SE2d 266) (2003).

reviewing a trial court's grant of summary judgment, we apply a de novo standard of review and view the evidence, and all reasonable inferences therefrom, in a light most favorable to the non-moving party.[2]

Viewed in this light, the record reveals that Paul McClesky applied for employment with Home Depot in August 1999. In his employment application, McClesky indicated that he had *not* been convicted of a felony or misdemeanor within the past five years. Home Depot hired McCleskey.

As part of the hiring process, McClesky signed a consent form, permitting Home Depot and its agents to perform a background check. This consent form provided, in pertinent part, that McClesky

> release[d] Home Depot and/or its agents and any person or entity, which provides information pursuant to this authorization, from any and all liabilities, claims, or lawsuits in regard to the information obtained from any and all of the above referenced sources used.

In October 2000, Home Depot requested that Vericon conduct a criminal background search on McClesky. A third party actually conducted the investigation. After receiving the report, Vericon faxed the results of the investigation to Home

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[2] See id.

Depot on November 13, 2000. The report suggested that McClesky had used the name Edward James Sims, Jr., as an alias and that Sims had been convicted for several crimes in 1998.[3] On November 16, 2000, Home Depot terminated McClesky for falsifying his employment application.

On November 14, 2001, McClesky sued Home Depot, several of its employees, and Vericon, alleging, inter alia, claims for negligence, defamation, libel, and slander. According to McClesky, he never used Edward James Sims as an alias and did not commit the crimes referred to in the report. Vericon moved for summary judgment, asserting that the release McClesky signed barred the suit.[4] Vericon also asserted that the libel, slander, and defamation claims were not filed within the statute of limitation. The trial court agreed, granted Vericon's motion, and this appeal ensued.

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[3] Specifically, the report stated that Sims "may or may not be" McCleskey. It is not entirely clear from the record or the briefs how it was determined that McClesky may have used Sims as an alibi.

[4] Vericon refers to the form as a "covenant not to sue," and there apparently was a question raised at the trial level as to whether the consent form was a release or a covenant not to sue, which are distinct. See *Marrett v. Scott*, 212 Ga. App. 427, 429-430 (1) (c) (441 SE2d 902) (1994). The trial court pretermitted the issue, and McClesky does not address the distinction on appeal. For the sake of clarity, we refer to the agreement as a release.

1. McClesky contends that the trial court erred in finding that the release he signed barred his suit against Vericon. Specifically, McCleskey points to the fact that Vericon did not have a Georgia license to conduct background investigations as required by OCGA § 43-38-1 et seq. Pursuant to OCGA § 43-38-16, "[a]ny person who engages in the . . . private security business or offers, pretends, or holds himself out as eligible to engage in the . . . private security business . . . and who is not legally licensed or registered under this chapter shall be guilty of a misdeamonor." McCleskey cites *Georgia Central Credit Union v. Weems* for the principle that contracts made in violation of a statute are void and unenforceable.[5] Thus, McCleskey reasons, Vericon's lack of a license voided its contract with Home Depot, and any information it provided was "illegally obtained." We find McCleskey's reasoning unpersuasive for multiple reasons, two of which we will address here.

First, the record reveals unequivocally that Vericon did not, in fact, perform the investigation. Rather, Vericon subcontracted the actual investigation to a third party, and McCleskey points to no evidence showing, or even suggesting, that the entity that performed the search lacked a license.

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[5] 157 Ga. App. 439, 440 (1) (278 SE2d 88) (1981).

Second, McClesky's licensing argument is a red herring. McCleskey argues that the agreement between Home Depot and Vericon is void due to Vericon's lack of a license. However, the dispositive issue is not the validity of the agreement between Home Depot and Vericon, but the validity of McClesky's agreement to release Home Depot and its agents from any and all claims and lawsuits stemming from its background check. Such agreements are generally binding absent evidence of gross negligence or wilful or wanton misconduct.[6] Accordingly, McCleskey is barred from bringing his negligence claims against Vericon, which acted as an agent of Home Depot.[7]

In his complaint, McCleskey arguably asserted a claim for gross negligence, which would not be barred by the release. In order to sustain this claim, however, McCleskey must point to some evidence of gross negligence. Here, the record reveals that the only actions taken by Vericon included: entering an agreement with Home Depot to provide background checks; contracting with a third party to conduct the investigation; and

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[6] See *Barbazza v. Intl. Motor Sports Assn.*, 245 Ga. App. 790, 792 (2) (538 SE2d 859) (2000); *Hall v. Gardens Svcs., Inc.*, 174 Ga. App. 856, 857 (332 SE2d 3) (1985). ("Exculpatory clauses in contracts in Georgia are valid and binding and not void as against public policy where the bailor relieves himself from his own negligence, except for that negligence which amounts to wilful and wanton misconduct.").

[7] See *Barbazza*, supra.

forwarding the results to Home Depot. There is nothing in this conduct that remotely can be considered evidence of gross negligence, especially as the report merely indicated that McCleskey and Sims *might* be the same person. It follows that the trial court properly granted summary judgment as to any claim for gross negligence.[8]

2. McCleskey also contends that the trial court erred in finding his libel, slander, and defamation claims barred by the statute of limitation. As noted by the trial court, the applicable statute of limitation is one year.[9] Here, the trial court found that the report was "published" on November 13, 2000, the date Vericon provided the report to Home Depot. Because suit was not filed until November 14, 2001, the trial court determined that it was barred by the statute of limitation. On appeal, McCleskey contends that the actual publication date was November 16, 2001 – the date he was fired.[10] Thus, he concludes, the trial court erred in using the earlier date. Again, we find McCleskey's arguments lack merit for several reasons.

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[8] See id. at 792-793 (3).

[9] See OCGA § 9-3-33; *Brewer v. Schacht*, 235 Ga. App. 313, 317 (4) (a) (509 SE2d 378) (1998); *Lee v. Gore*, 221 Ga. App. 632, 635 (2) (472 SE2d 164) (1996).

[10] McCleskey's argument in this regard is particularly convoluted. It appears to stem from his contention that there was an unidentified person present in the room on the day he was fired for falsifying his employment application.

Given our conclusion in division one that the release McCleskey signed was valid, he arguably is barred from maintaining his defamation and libel claims against Vericon.[11] Assuming, for the sake of argument, that the libel and/or slander claims allege wilful or wanton conduct, the claims still must fail.

The evidence is undisputed that Vericon provided the report to Home Depot on November 13, 2000. Thus, the only "publication" by Vericon occurred on this date, which is clearly beyond the statute of limitation.[12] Although McCleskey suggests that Vericon published the defamatory information on November 16, 2000, there is absolutely no evidence that anyone from Vericon was present during the meeting. In other words, McClesky seeks to hold Vericon, the agent, liable for actions of Home Depot, the principle. However, McClesky provides no authority for his novel proposition that an

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[11] See id.

[12] Ironically, McCleskey acknowledges that Vericon's actions on this date could not constitute "publication." Indeed, he quotes that "the publication of allegedly defamatory information in the course of an employer's investigation of an employee's job performance, when made to persons in authority, is not 'publication' within the meaning of OCGA § 51-5-1 (b)." *Kramer v. Kroger Co.*, 243 Ga. App. 883, 889 (2) (b) (534 SE2d 446) (2000) (punctuation omitted). It seems this case eviscerates McCleskey's argument on appeal.

agent may be held liable for the acts of a principle.[13] As the evidence demonstrates that the only alleged defamation or libel by Vericon occurred outside the statute of limitation, the trial court properly granted summary judgment on this basis.[14]

Judgment affirmed. Smith, C. J., and Miller, J., concur.

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[13]We do note that in certain circumstances an agent who engages in misfeasance in the performance of his duties may be liable to a third person who is thereby injured. See, e.g., *Sharp-Boylston Co. v. Bostick*, 90 Ga. App. 46, 48 (81 SE2d 853) (1954). However, McClesky has not cited any case in this regard much less argued that the reasoning should be applied to extend the statute of limitation.

[14] See *Smith v. Adamson*, 226 Ga. App. 698, 701-702 (7) (487 SE2d 386) (1997).

97-048

ORIGINAL

IN THE COURT OF APPEALS
STATE OF GEORGIA

PAUL A. McCLESKY,	*	
Appellant,	*	
vs.	*	
	*	**CASE NO. A03A1066**
THE HOME DEPOT, INC., RICKY JORDAN, WILLIE GONZALES, CARLA BROWN, & VERICON RESOURCES, INC.,	*	
Appellees.	*	
	*	

NOTICE OF INTENTION TO APPLY TO THE GEORGIA SUPREME COURT FOR WRIT OF CERTIORARI

TO THE CLERK OF THE COURT OF APPEALS OF GEORGIA:

You are hereby notified that it is the intention of Paul McClesky, Appellant, to apply to the Georgia Supreme Court for writ of certiorari to review the judgment of the Court of Appeals rendered and filed in the above stated case on November 7, 2003.

This 14th day of November, 2003.

Of Counsel:
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Marietta, GA 30060
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GEORGE T. SMITH
Georgia Bar No. 658100
Counsel for Appellant

ORIGINAL

IN THE COURT OF APPEALS
STATE OF GEORGIA

PAUL A. McCLESKY,	*	
Appellant,	*	
vs.	*	
	*	**CASE NO. A03A1066**
THE HOME DEPOT, INC.,	*	
RICKY JORDAN, WILLIE	*	
GONZALES, CARLA BROWN,	*	
& VERICON RESOURCES, INC.,	*	
Appellees.	*	
	*	

NOTICE OF FILING OF PETITION FOR CERTIORARI

TO THE CLERK OF THE COURT OF APPEALS OF GEORGIA:

You are hereby notified that Paul A. McClesky has this day filed a Petition for Writ of Certiorari in the above action with the Georgia Supreme Court,

This the 26th day of November, 2004.

Of Counsel:
BROWNING & TANKSLEY, LLP
166 Anderson Street, Suite 225
Marietta, GA 30060
(770) 424-1500

GEORGE T. SMITH
Georgia Bar No. 658100
Counsel for Appellant

CERTIFICATE OF SERVICE

This is to certify that I have this day served opposing counsel with a copy of the within and foregoing. by depositing a copy of said pleading in the United States Mail with sufficient postage affixed thereto to insure proper delivery and addressed as follows:

John F. Wymer, III, Esq. King & Spalding 191 Peachtree Street Atlanta, Georgia 30303	Counsel for Home Depot USA, Inc., Ricky Jordon, Willie Gonzales, and Carla Brown, Defendants.
Michael A. Dalton, Esq. John W. Campbell, Esq. Swift, Currie, McGhee & Hiers 1355 Peachtree St., N.E., Suite 300 Atlanta, Georgia 30309	Counsel for Vericon Resources Inc. Defendant

This the 26th day of November, 2003.

GEORGE T. SMITH
Counsel for Appellant

CLERK'S OFFICE
SUPREME COURT of GEORGIA
244 Washington Street, Room 572
Sherie M. Welch, Clerk — Atlanta, Georgia 30334 — (404) 656-3470
Business Hours: Monday - Friday, 8:30 a.m. to 4:30 p.m.

Docketing Date: November 26, 2003

To the Clerk of the Court of Appeals of Georgia:

You are hereby notified that there has been filed in this office on this day a petition to the Supreme Court for a writ of certiorari to the Court of Appeals in the case of **S04C0521**

PAUL A. MCCLESKY v. HOME DEPOT, INC., et al.

Clerk, Supreme Court of Georgia

Case No. A03A1066
Court of Appeals of Georgia
Notice of Petition for Certiorari
filed in office

Clerk, Court of Appeals of Georgia

SUPREME COURT OF GEORGIA

Remittitur, Case No. S04C0521 Atlanta, March 1, 2004

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

PAUL A. MCCLESKY v. HOME DEPOT, INC., et al.

Upon consideration of the petition for certiorari filed to review the judgment of the Court of Appeals in this case, it is ordered that the writ be hereby denied.

All the Justices concur.

Court of Appeals Case No. A03A1066

FILED IN OFFICE
APR 28 2004
COURT CLERK
CLERK COURT OF APPEALS OF GA

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta April 27, 2004

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.
Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

REMITTITUR

Court of Appeals of the State of Georgia

ATLANTA, NOVEMBER 07, 2003

The Court of Appeals having met, the following judgment was rendered:

COURT OF APPEALS CASE NO. A03A1066
PAUL A. MCCLESKY V. VERICON RESOURCES, INC.

This case came before this court on appeal from the State Court of DeKalb County; it is considered and adjudged that

THE JUDGMENT OF THE COURT BELOW BE AFFIRMED.

SMITH, C.J., RUFFIN, P.J., AND MILLER, J., CONCUR.

LC NUMBERS: 01A858135

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta, **APR 28, 2004**

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

COURT OF APPEALS OF GEORGIA

334 STATE JUDICIAL BUILDING
ATLANTA, GEORGIA 30334
(404) 656-3450

APPEAL SUMMARY PAGE

CLASSIFICATION: SJ/Tort/Damages

CASE NUMBER: A03A1066 DATE OF DOCKETING: JANUARY 29, 2003

STYLE: PAUL A. MCCLESKY V. VERICON RESOURCES, INC.

LOWER COURT SUMMARY INFORMATION:

DEKALB County State Court

TRIAL JUDGE: HONORABLE MATHEW ROBINS

DATE OF JUDGMENT: 10-17-2002 NOTICE OF APPEAL DATE: 11-14-2002

01A858135

RECORDS DESCRIPTION:		PARTS:
012903	LOWERCOURT RECORDS.	03
012903	TRANSCRIPTS.	

COURT OF APPEALS CODE: 97-048
TERM: Apr. Cal. Mo.: MAY/03

DIVISION 4 PANEL CIR PATH: 97, 90, 71.
DIVISION 4 PANEL CIR PATH: 97, 90, 71, 95, 93, 94, 96.

COURT OF APPEALS OF GEORGIA

334 STATE JUDICIAL BUILDING
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(404) 656-3450

APPEAL SUMMARY PAGE

CASE NUMBER: A03A1066 DATE OF DOCKETING: JANUARY 29, 2003

STYLE: PAUL A. MCCLESKY V. VERICON RESOURCES, INC.

DEKALB County State Court
TRIAL JUDGE:

ATTORNEY REGISTER:

ATTORNEYS FOR APPELLANT:

Mr. George T. Smith
BROWNING & TANKSLEY, LLP
166 ANDERSON STREET
SUITE 225
MARIETTA GA 300600000

ATTORNEYS FOR APPELLEE:

Mr. Michael Alan Dalton
SWIFT, CURRIE, MCGHEE & HIERS, LLP
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Mr. John W. Campbell
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OTHER PARTY REPRESENTATION:

Mr. John F. Wymer
KING & SPALDING

191 PEACHTREE STREET, N.E.
ATLANTA GA 303031763

Ms. Jennifer Lynn Kirk
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COURT OF APPEALS OF GEORGIA

334 STATE JUDICIAL BUILDING
ATLANTA, GEORGIA 30334
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Business Hours: Monday - Friday, 8:30 a.m. to 4:30 p.m.

NOTICE OF DOCKETING

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IMPORTANT RULE REQUIREMENTS AND INFORMATION

Appellant's brief which shall include as Part II an Enumerations of Errors shall be filed within 20 days of docketing. No appellant's brief shall be received for filing without the $80.00 filing fee or sufficient paupers's affidavit (OCGA Section 5-6-4).

Appellee's brief shall be filed within 40 days after the docketing date or 20 days after the filing of the brief of the appellaent, whichever is LATER.

Failure to timely file briefs or responsive briefs or to follow any of the Court's rules or orders may cause the appeal to be dismissed or may cause non-consideration of the Appellee's brief, and may subject the offender to contempt.

The contents of a properly addressed registered or certified mailing shall be deemed filed on the U. S. Postal Service hand stamped postmark date if it is stamped on the envelope or container. Motions for reconsideration are deemed filed on the date actually received in the clerk's Office.

If oral argument is requested and approved by this Court in accordance with Rule 28, as revised effective Sept. 1, 1995, this case will be scheduled for oral argument on MAY 27, MAY 28, , ,2003 before the FOURTH Division: RUFFIN,,PJ., SMITH, CJ., MILLER, J A printed calendar showing the exact date of argument will be mailed to counsel of record. If you do not receive a calendar at least ten days prior to the tentative oral argument date, please contact the Clerk's Office.

There shall be no communications relating to pending appeals to any judge or member of the judge's staff.

IF YOU HAVE A QUESTION OR PROBLEM, PLEASE CALL THIS OFFICE.

WILLIAM L. MARTIN, III, CLERK

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